NAFTA : implementation and the participation of the provinces

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The division of legislative powers between the two levels of government (federal and provincial) in the Canadian federation causes certain problems in the implementation of international treaties.

A treaty is an agreement between two or more countries. Like individuals who agree to be bound by various types of contracts, countries make various types of commitments when they sign a treaty.

In the case of a defence cooperation agreement, the obligations of the countries are limited to what is agreed upon in the treaty and have no direct effect on domestic legislation applicable in each country. The effects are different, however, in the case of a trade accord such as the North American Free Trade Agreement (NAFTA). This agreement was not reached solely for the benefit of the signatory states as entities of international law; it was also designed to amend certain international trade practices and to facilitate trade relations among nationals of the countries that signed the treaty.

Under this type of treaty, Canada makes a commitment to reduce its customs tariffs and to eliminate other barriers to foreign trade. In order to do so, Parliament must amend its legislation or regulations in the area. The changes which Parliament makes to its domestic legislation based on, or in order to comply with, the treaty thus are the means of implementing the treaty.

Parliament cannot amend provincial legislation or pass a new statute in an area of provincial legislative jurisdiction. Thus, a treaty (or a specific section thereof) whose subject falls within the legislative competence of the provinces cannot be implemented unless the provincial legislatures intervene with respect to the matters within their jurisdiction.

In order to grasp the complex nature of the Canadian situation, we must first try to establish who has authority over international relations within the Canadian federation and comment on the distinction between the signing of a treaty and its implementation. This will lead us more specifically to discuss the difficulties involved in implementing treaties in Canada. Lastly, we will make a few remarks on Canada's international liability.

AUTHORITY OVER EXTERNAL RELATIONS

It is impossible to tell from the division of legislative powers provided in the *Constitution Act, 1867* which level of government, federal or provincial, has authority to sign a treaty with a foreign government. No provision is made in the Canadian Constitution for a jurisdiction anything like external relations or international relations. This is understandable, however, because when the *Constitution Act, 1867*[1] was passed by the British Parliament in London, Canada was still a colony of the British Empire.

While the *Constitution Act, 1867* provided for the creation of a new country (the Dominion of Canada), that country did not immediately acquire all the attributes of sovereignty on the international scene. Its international "personality" remained incomplete. The British Parliament reserved for the British Crown the power to represent the Dominion of Canada internationally and to sign treaties with foreign countries on its behalf. Under section 132 of the *Constitution Act, 1867*, however, the federal government was given responsibility for implementing in Canada treaties entered into by the British Crown, where these were applicable to this country.

The Canadian government gradually intervened on its own authority in discussions concerning the negotiation of treaties and international conventions.[2] Over the years, Canada

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(1) The *British North America Act, 1867*, 30-31, Vict., chap. 3, (U.K.), passed by the British Parliament, has borne the title *Constitution Act, 1867* since 1982.

(2) For details on the development of Canada as an international entity, see J.-C. Bonenfant, "Le développement du statut international du Canada," in Paul Painchaud, *Le Canada et le Québec sur la scène internationale*, Centre québécois de relations internationales, Quebec City, 1977, p. 31-49.

increasingly acquired independence in its external affairs.(3) After the First World War, the Canadian government acted on its own authority in international affairs, and British authorities merely ratified the treaties submitted to them. In 1931, the *Statute of Westminster* recognized that Canada and a number of other Dominions of the British Empire were entirely independent(4) and had the power to act on the international stage with all the attributes of a sovereign state. Canada was then invested with full powers in external affairs. By the same token, however, section 132 of the *Constitution Act, 1867* became obsolete.

Relations with foreign countries, which have always been a Royal prerogative (that is of the British Crown), are exercised in Canada by the representative of the Sovereign, that is the Governor General in Council (the Cabinet).(5)

The popular belief is that the head of state is the only person able to represent Canada internationally and that he or she alone has the power to sign treaties and international conventions on its behalf. The reality, however, is quite different. While the Cabinet retains ultimate effective control over the ratification of treaties, they may be negotiated and signed by any person authorized. Apart from the Prime Minister, those persons are usually ministers, deputy ministers, diplomatic representatives or negotiators of the Canadian government.

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(3) The traditional use of the term "external affairs" in reference to foreign relations continues in Canada. Out of respect for the British Crown, which reserved the term "foreign affairs" for its own use within the Empire, Canada still refuses to employ the term "foreign" or its French translation (étranger/étrangère), hence the use of the terms "external," "external affairs" and "external relations." P.W. Hogg, *Constitutional Law in Canada*, Carswell, Toronto, 1991, p. 290-291; J.-C. Bonenfant, "Le développement du statut international du Canada," in Paul Painchaud, *Le Canada et le Québec sur la scène internationale*, Centre québécois de relations internationales, Quebec City, 1977, p. 43, note 25.

(4) Except with respect to amendments to the Canadian Constitution, which remained under the authority of the British Parliament until 1982.

(5) The *Statute of Westminster* did not determine whether the federal government alone had authority over external affairs or whether that authority was shared with the provinces, along the lines of the division of legislative powers provided in the Constitution or interpreted by the courts. In this paper, we shall not discuss the theory that this prerogative is shared between the Governor General and the Lieutenant-Governors of the provinces. See Lorne Giroux, "La capacité internationale de provinces en droit constitutionnel canadien," (1967-68) *Les Cahiers de Droit 241*. According to that theory, the provinces have a partial international personality related to their areas of legislative jurisdiction. According to the dominant doctrine, however, the provinces do not have such powers internationally. P.W. Hogg, *Constitutional Law in Canada*, Carswell, Toronto, 1992, p. 298.

Once the Cabinet approves an agreement reached between Canada and a foreign country, that agreement becomes an international treaty, provided it is also ratified by the other signatories.

The treaty negotiated and signed for and on behalf of Canada by a representative of the Canadian government, and subsequently approved by the Governor General in Council, will be binding on Canada. This approval usually takes the form of an Order in Council. The Cabinet may also approve the text of an international treaty which has not yet been signed and may delegate a representative of the Canadian government to sign it on behalf of Canada. That mandate should appear in the appropriate Order in Council.(6)

The ratification and signing of an international treaty must not be confused with its entry into force, which is determined by the treaty itself or by an agreement between the parties. It is generally the date of the exchange or tabling of instruments of ratification. Thus, if NAFTA receives all the necessary approvals for its commencement, section 2203 provides that the agreement will go into effect on 1 January 1994.

DISTINCTION BETWEEN SIGNING AND IMPLEMENTATION OF A TREATY

An international treaty does not have to be approved by Parliament in order to go into effect. Although the practice is that treaties are tabled in Parliament once ratified by the Canadian government, their tabling does not make those treaties applicable in domestic law. The reason is simple. Parliament (as well as the legislature of each province) is the only state institution that can adopt and amend statutes. Parliament (or the provincial legislature) is sovereign in its areas of legislative jurisdiction, and the executive branch may not intervene in those areas in any way.

Even if the treaty is in effect, that is to say that it has been signed and ratified by all the parties, that does not mean that it has any effect on domestic law in Canada. In this case, it does not have to be ratified by Parliament. Not all treaties have effect in domestic law.

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(6) On the Canadian practice in this area, see Jean-Yves Grenon, "De la conclusion des traités et de leur mise en oeuvre au Canada," 15 *Canadian Bar Review*, Vol. 40, 1962.

However, where a treaty directly affects Canadian domestic law, it must be approved by Parliament in order to have any such effect.

In addition to approving the treaty, Parliament must very often amend its legislation according to the terms of the treaty in question by so stating in an enabling statute.

One can immediately see the limit of this approval, since Parliament, the legislative branch of Canada's federal government, may amend only those legislative provisions that are within its jurisdiction. If the treaty in question concerns a domestic field within provincial jurisdiction, Parliament may not act. That was the essence of the Privy Council judgment in the *Labour Conventions* case.(7)

Since that judgment, it has usually been recognized that treaties should be implemented within Confederation by the level of government with legislative authority over the subject of the treaty.

To be more specific, it was found in *Labour Conventions* that Parliament may not legislate in an area of provincial jurisdiction, even if its purpose in so doing is to implement an international treaty.

The signing of NAFTA illustrates even more acutely the problem of the division of legislative powers in Canada. Even though the purpose of the agreement is to regulate foreign trade with our southern neighbours, this regulation has a direct effect on the law applicable in Canada.

In fact, when an international treaty signed by the federal government affects areas of provincial legislative jurisdiction, the provinces must intervene and amend their legislation if necessary in order to give effect to that treaty. Some provisions of NAFTA may be considered, at least in certain respects, as falling within provincial legislative jurisdiction (Chapter 3: Textiles and Clothing; Chap. 7: Agriculture; Chap. 12: Services).

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(7) *A. G. Canada v. A. G. Ontario* (1937) A.C. 326. In this case, the Canadian government had approved three international labour conventions. Parliament had passed legislation on the subject to implement them in Canada. The statutes were challenged, *inter alia*, by the provinces, which saw the legislation as an intrusion in their legislative jurisdiction. It was decided that Parliament could not pass such legislation, even in order to implement Canada's international obligations, because labour was an exclusive jurisdiction of the provinces.

INTERNATIONAL LIABILITY: FEDERAL AND PROVINCIAL INVOLVEMENT

Signing an international treaty is one thing, but its observance is another. Since the Canadian government alone is the international representative of the Canadian federation, it is the only entity responsible for compliance with international conventions implemented in Canada. However, since it does not have full powers to implement such treaties, one sees that there are serious weaknesses in its ability to exercise this responsibility.

Where a treaty, or even part of it, concerns areas of provincial legislative jurisdiction, a so-called "federal clause" is usually introduced in order to limit Canada's liability. The federal clause has the effect, to varying degrees depending on its wording and the subject of the treaty in question, of informing all the parties to the treaty, that the Canadian government may encounter difficulties in implementation because it must first secure the cooperation of the Canadian provinces.

By thus introducing a "federal clause" in certain treaties that it has signed, the Canadian government limits its liability, should the provinces — or even one province — refuse to pass and amend legislation in accordance with the treaty's provisions.

The effect of such a "federal clause" is, however, ambiguous. One can argue either that it obliges the Canadian government to make its best effort to carry out the treaty, or that it obliges it to succeed in this effort. There is an enormous difference between the two. If the Canadian government had an obligation to succeed but was not able to secure the cooperation of one province in implementing the international treaty in domestic law, another party to the treaty might invoke Canada's international liability. This would not be the case if Canada had only an obligation to make its best effort. To avoid international liability in such circumstances, the Canadian government need only establish that, despite all its efforts or negotiations, it had proved impossible to obtain the cooperation of at least one province.

Paragraph XXIV(12) of the General Agreement on Tariffs and Trade (GATT) is considered a typical example of a best-effort obligation. That provision reads as follows:

> XXIV(12) Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

The text of Article 105 of NAFTA is somewhat different, however.

> 105. The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement by state and provincial governments.

Whereas the text of the General Agreement speaks of taking "such reasonable measures as may be available to it", NAFTA contains more imperative terms: "shall ensure that all necessary measures are taken in order to give effect ...".

Some authors see the text of NAFTA as imposing a performance obligation on the Canadian government.[8] If this interpretation is correct, it means that unless the Canadian government could implement each and every provision in NAFTA, it would be in default and could be subject to an application for dispute settlement, and possibly reprisals, by the United States and Mexico.

Since the Canadian government's default would be partly related to the federal structure of our country rather than to its refusal to act or to comply with NAFTA, it is surprising that the treaty contains such strict terms.

CONCLUSION

The Canadian government may prevent the question of its liability under NAFTA from being raised if it can secure the cooperation of the provinces in implementing the treaty. The principle of cooperative federalism would provide a more satisfactory solution for all levels

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(8) I. Bernier, "L'Accord de libre-échange Canada-États-Unis et la Constitution," in Marc Gold and David Leyton-Brown, Eds., *Trade-Offs on Free Trade - The Canada-U.S. Free Trade Agreement*, Carswell, Toronto, 1988, p. 100. H. Scott Fairley, "Jurisdictional Limits on National Purpose: Ottawa, the Provinces and Free Trade with the United States," in Marc Gold and David Leyton-Brown, Eds., *Trade-Offs on Free Trade - The Canada-U.S. Free Trade Agreement*, Carswell, Toronto, 1988, p. 109.

of government in Canada than would the federal government's exclusive jurisdiction over international trade, which some would like to see recognized with respect to the implementation of treaties.

Current practice is tending in this direction. The federal government usually consults the provinces before ratifying a treaty that may require their participation in implementation. With good will on all sides, provincial cooperation will enable the Canadian government to play an increasingly important international role, which can only be to the benefit of every Canadian region.

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